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In the Supreme Court of the United States

OCTOBER TERM, 1977

KALVAR CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a decision of the United States Court of Claims rejecting its breach of contract claim against the United States.

Petitioner was granted a "primary source of supply" contract to provide the General Services Administration ("GSA") with its 1973 fiscal year requirements of microfilm having a speed rating within certain specified ranges (Pet. App. 1a-2a, 16a-17a, 27a). In October 1972, the Internal Revenue Service ("IRS") requested GSA to supply it with film that would operate at 200 feet per minute rather than at 60 feet per minute, which was the speed of the film being supplied under petitioner's contract. IRS specifically requested Kalvar Mikrolith 200 and Xidex HS-66 film (Pet. App. 2a, 17a-18a, 27a). Based on data submitted by petitioner and Xidex and an

analysis of the data by its own technical staff, GSA concluded that the requested films fell outside the range specified in petitioner's contract (Pet. App. 2a, 18a, 27a), accordingly solicited offers from petitioner and Xidex for the faster film, and issued commitment documents to both suppliers (Pet. App. 2a, 18a, 28a).

Subsequently, petitioner notified GSA that it disputed the new contract with Xidex, claiming that Xidex HS-66 film came within the specifications of petitioner's contract and that GSA had breached that contract by not limiting its source of supply to petitioner (Pet. App. 2a, 18a-19a, 28a).[1] GSA and the Comptroller General rejected the claim (Pet. App. 16a-25a, 26a-31a).

Petitioner then sued for breach of contract in the Court of Claims. The court held that petitioner's action was foreclosed because the contract incorporated standard provisions providing for its termination for the convenience of the government, which, under settled law, effectively converted the alleged breach into a termination for convenience absent a showing of bad faith or abuse of discretion (Pet. App. 2a-3a). The court found that there had been no showing of bad faith or abuse of discretion and granted the government's motion for summary judgment (Pet. App. 1a-14a). The court remanded to the trial judge for a determination of the appropriate cost reimbursement to petitioner resulting from the termination, which the court held to be limited to the reasonable cost of preparing and filing "Plaintiff's Supplemental Statement and Brief" (Pet. App. 14a).[2]

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[1]Petitioner also withdrew its offer to supply its Mikrolith 200 film.

[2]In view of its holding, the court did not reach the issue whether the Xidex HS-66 film fell within the specifications of petitioner's contract.

The decision of the Court of Claims was correct and does not warrant further review by this Court.

1. Although petitioner apparently contends to the contrary (Pet. 15-17, 22-24), it is well established that under standard termination-for-convenience clauses,[3] an alleged breach by the government of the kind involved here effectively becomes a termination for convenience absent evidence of bad faith or abuse of discretion, notwithstanding the fact that the government had not specifically intended to terminate or had failed to follow specific termination procedures. *Inland Container, Inc.* v. *United States*, 512 F. 2d 1073 (Ct. Cl.); *G.C. Casebolt Co.* v. *United States*, 421 F. 2d 710 (Ct. Cl.); *Nesbitt* v. *United States*, 345 F. 2d 583 (Ct. Cl.), certiorari denied, 383 U.S. 936; *John Reiner & Co.* v. *United States*, 325 F. 2d 438 (Ct. Cl.), certiorari denied, 377 U.S. 931.[4]

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[3]The scope of such a clause was described in *John Reiner & Co.* v. *United States*, 325 F. 2d 438, 442 (Ct. Cl.):

> Such termination is authorized "whenever the contracting officer shall determine" that it is "in the best interests of the Government." The broad reach of that phrase comprehends termination in a host of variable and unspecified situations calling (in the contracting officer's view) for the ending of the agreement * * *. Under such an all-inclusive clause, the Government has the right to terminate "at will" (*Davis Sewing Mach. Co.* v. *United States*, 60 Ct. Cl. 201, 217 (1925), aff'd, 273 U.S. 324, 47 S. Ct. 352, 71 L. Ed. 662 (1927); *Librach* v. *United States*, 147 Ct. Cl. 605, 611 (1959)), and in the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive. See *Line Constr. Co.* v. *United States*, 109 Ct. Cl. 154, 187 (1947).

[4]The basis for this longstanding line of cases is Mr. Justice Brandeis' statement for the Court in *College Point Boat Corp.* v. *United States*, 267 U.S. 12, 15-16 (footnotes omitted):

> A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse

2. The Court of Claims correctly rejected petitioner's further assertion that the government had acted in bad faith or had abused its discretion. Petitioner asserts primarily that GSA showed bad faith by failing to disclose the IRS special request to petitioner; by not seeking to fulfill the IRS requirements with petitioner's film; and by determining that the Xidex film was beyond the scope of petitioner's contract (Pet. 8-10). However, on the basis of the record and on the Comptroller General's opinion, the court correctly determined that petitioner's contract did not require GSA to disclose the IRS special request to petitioner or otherwise to afford petitioner the opportunity to supply film outside specifications of the contract (Pet. App. 6a).[5] In addition, the court found that GSA had not acted in bad faith when it determined, on the basis of Xidex's representations, which were verified by GSA's technical staff, that the film requested by IRS was outside the scope of petitioner's contract (Pet. App. 7a). The court observed that the fact that GSA might have used better testing methods (which it has in fact subsequently adopted), or that it might have been unwise in relying on Xidex's technical representations, did not establish bad faith (*ibid.*). See *Nolan Brothers, Inc.* v. *United States*, 405 F. 2d 1250, 1253 (Ct. Cl.); *Colonial Metals Co.* v. *United States*, 494 F.2d 1355,

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for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.

[5]The court also observed that even if the Comptroller General's interpretation of the contract was incorrect in this respect, that error would not demonstrate bad faith (*ibid.*). See *Nolan Brothers, Inc.* v. *United States*, 405 F.2d 1250, 1253 (Ct. Cl.).

1361 (Ct. Cl.). Those factual determinations do not warrant further review.[6]

3. Finally, the Court of Claims correctly limited petitioner's damages to the recovery of costs which are permitted when contracts are terminated for convenience. The termination-for-convenience clause limits recovery to completed supplies accepted by the government, costs of performance of terminated work (*i.e.*, initial and preparatory expenses) and costs of settling and paying claims arising out of termination. 41 C.F.R. 1-8.701. A government contractor may not recover anticipated profits when a contract is terminated. *Colonial Metals Co.* v. *United States, supra,* 494 F. 2d at 1362; *Nolan Brothers, Inc.* v. *United States, supra,* 405 F. 2d at 1254-1255.

Except for legal expenses reasonably necessary for the preparation of plaintiff's supplemental brief, which the court equated with termination settlement claims, petitioner's other categories of cost (see Pet. 13-14)[7] pertain to recovery of anticipated profits and do not otherwise fall within the requirements of 41 C.F.R. 1-8.701.

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[6]Petitioner asserts (Pet. 19-22) that GSA abused its discretion in violating various regulations that generally require government agencies to comply with primary source contracts and various procedures established with respect to them. Petitioner's argument ignores the termination-for-convenience clause in its own contract. The regulations do not abrogate such clauses or establish bad faith or abuse of discretion whenever a primary source contract is allegedly breached.

[7]These categories of cost included the difference between the contract price and the price at which petitioner could cover; inventory financing costs and higher per unit administrative costs for film not delivered to the government that is still available for sale; and costs that relate solely to the alleged breach.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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